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(R75-600)

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76-216

Mr. J. N. Trimble, Director
Arizona Department of Insurance
1601 West Jefferson
Phoenix, Arizona 85007

Dear Mr. Trimble:

In a letter from former Director of Insurance Millard Humphrey, dated September 26, 1975, regarding the re-examination of licensed insurance agents, several questions are raised concerning appropriate agency action following the discovery of inaccurate grading of tests administered by the Department of Insurance:

1. Can the Department require current license holders to retake an examination after a regrading discloses that they failed the examination initially?

The Director is authorized by A.R.S. § 20-316 to suspend, revoke, or refuse to renew a license if he finds the existence of any cause for which original issuance could have been refused. Since A.R.S. § 20-292(A) requires applicants for original licenses to pass a written examination, failure to pass constitutes cause for which original issuance could have been refused and is therefore grounds for suspension, revocation or refusal to renew under A.R.S. § 20-316. The decision to utilize sanctions under A.R.S. § 20-316 can be made conditional on the licensee's agreement to retake the examination. Such actions are permissible because licenses issued to insurance agents are not contracts and create no vested rights. Appleman, Insurance Law and Practice § 8636; Midwest Teen Centers, Inc. v. City of Roseville, 36 Mich.App. 627, 193 N.W.2d 906, 908 (1971); Latrielle v. Mich. State Bd. of Chiropractic Examiners, 357 Mich. 440, 98 N.W.2d 611, 615 (1959); Foster v. McConnell, 162 Cal.App.2d 701, 329 P.2d 32 (1958); Motor Ins. Corp. v. Robinson, 106 N.E.2d 572, affirmed 106 N.E.2d 581 (Ohio, 1951), appeal dismissed 344 U.S. 803.

The Director surely has the power to require re-examinations but the decision whether to exercise this power is discretionary. In making this decision the Director should consider the answers to the questions presented below.

2. Is there a time limit on the number of years during which the Department may lawfully regrade examinations and re-examine those found to have failed initially?

There is no statute of limitations applicable to this kind of agency action. Stebbins v. Dept. of Commerce, 10 Or.App. 54, 499 P.2d 350, 353 (1972); Latrielle v. State Bd. of Chiropractic Examiners, supra. Revocation or refusal to renew is not penal action and, therefore, is not governed by criminal statutes of limitations. Wayne v. Bureau of Private Investigators and Adjustors, 201 Cal.App.2d 427, 20 Cal.Rptr 194 (1962). Neither does a revocation proceeding constitute a civil cause of action as to which the general limitation of action would apply. Latrielle, supra.

Likewise, there appears to be no limitation in equity on this administrative action since the Arizona courts held in Chickering v. Ogonowski Const. Corp., 18 Ariz.App. 324, 501 P.2d 952 (1972), that "Equitable considerations cannot serve to relieve a party from compliance with the statutory requisite of a license. . . . " 18 Ariz.App. at 326. See also Am.Jur.2d, Equity § 155 for the principle that by accepting a license the licensee consents to provisions for revocation.

3. May the Department require a current license holder to submit a new license application, company appointments and appropriate license fees if he is re-examined?

Department rule A.C.R.R. R4-14-704, effective January 1, 1962, provides that individuals who fail to pass the life and/or disability insurance examination shall have to submit a new application and license fee. The Department has the power to require applicants who failed exams from 1962 to the present time to follow A.C.R.R. R4-14-704. If upon regrading, it appears that a license holder in fact failed the examination, the provisions of the rule would become applicable to him.

4. Is the objective examination used prior to March 1, 1975 to be administered to the licensees who are re-examined?

The examination to be administered should be the current examination. The purpose of A.R.S. § 20-292 is to insure the applicant's knowledge of insurance and his legal responsibilities as a licensee. The licensee has no vested right in being able to take a particular examination. (See Appleman § 8636 and cases cited supra.)

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5. Was the grading system applied to the examinations given prior to March 1, 1975 unlawful?

Although the Department did not promulgate a rule pursuant to A.R.S. § 20-292, Mr. Humphrey's letter indicates that 75% was considered a passing score. The old grading system caused an unreasonable distortion of the percentage scores by subtracting errors directly from 100 rather than from the number of points possible followed by a percentage determination. A.R.S. § 20-292(D) calls for grading to be conducted in a fair and impartial manner. The old grading system is inherently unfair.

Additionally, it is our opinion that if old examination papers are regraded, the correct percentage scores should be computed by dividing the total number of answers possible into the number of correct answers. Whether an applicant passed or failed should be decided according to his achieving or failing to achieve 75%.

The last three questions contained in Mr. Humphrey's letter are answered in the above responses.

If we can be of any further assistance to you in this matter, please do not hesitate to contact us.

Very truly yours,

BRUCE E. BABBITT
The Attorney General

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